

## ARTICLE

## CROSS-SECTORAL

# Non-binding coordination in regulation

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**Non-binding coordination instruments are widespread in the regulation of network industries, and crucial to avoid the negative consequences of specialised regulatory arrangements.**

In the post-liberalisation area, utility companies operate in a context of multilevel regulation, involving a wide set of authorities with general or sector-based competencies. At each level of authority, the competencies are divided between different organisations (for example, ministries, regulatory agencies, and competition courts). Such a specialisation within the regulatory arrangement can potentially generate overlaps and blind spots, as well as a lack of effectiveness. The aim of this article is to underline the role of non-binding coordination instruments in the potential prevention of the negative consequences of specialisation in the regulation of network industries. It shows what kinds of non-binding coordination instruments are used in multi-level, multi-players, and multi-tasks regulatory arrangements. The empirical analysis is based on a comparison of two utility sectors, energy and telecommunications, in Belgium.

## Specialisation and Coordination in Regulatory Arrangements

Regulatory bodies are involved in several tasks: translation of general policies in more concrete rules (for example, standards of interconnection); application of rules in individual cases (for example, license for supply); and monitoring of compliance (for example, sanctioning). While regulatory functions have for a long time been carried out by central administrations, they are increasingly shared with, and delegated to, specialised agencies and other both supra- and sub-national authorities. The regulatory arrangement encompasses all the organisations involved in these regulatory tasks.

Liberalisation broke up the multi-objective bureaucracies embodied in monolithic departments into small single-purpose organisations, with limited objectives and specific tasks, a process called specialisation. Specifically towards the regulation of utilities, four dimensions of specialisation can be identified: first, a vertical specialisation across governmental levels (for example, European, federal and regional); secondly, a horizontal specialisation within a sector, divided between several public sector organisations (for example, ministry and agencies); thirdly,

specialisation between sector-specific regulators and general competition authorities; and fourthly, specialisation between sectors.

Without sufficient coordination, a specialised regulatory arrangement is at risk to progressively lose macro-control, if specialised organisations only manage the specific issue they have competence over, without taking into account multiple societal interests. Coordination is a process that aims at enhancing the voluntary and forced alignment of tasks and efforts of organisations within the public sector (Verhoest and Bouckaert 2005). It may help to reduce administrative burdens, improve the enforcement of regulation, and increase the regulators' accountability.

The coordination instruments can be more or less integrative: Organisations may simply limit themselves to exchange information and adapt unilaterally, or they can reach mutual adjustments through extensive negotiation or coercion. Among these, some are non-binding. First, the non-binding advice or consultation involves a tier into the decision-making process of another regulatory body (for example, the main sector regulator drafts a minister's decision or gives an advice about a case to the competition authority). This instrument is procedural, that is, specifically defined in legally set procedures. Second, structural interactions between regulators occur within advisory platforms, procedures for information exchange, or other coordinating functions or bodies. Thus, a series of non-binding coordination instruments exist which may help to limit the negative effects of specialisation in regulatory arrangements.

## Non-Binding Coordination in Belgian Telecommunications

In Belgium, the liberalisation of the sector is due to the European Union policy that has opened the market in 1998. In order to tackle the persisting market dominance of some, the EU revised the legal framework in 2003 and pushed economic regulation very close to general competition law. The regulatory arrangement is centralised around the European Commission, while the sector-based regulator—namely the Belgian Institute for Post and Telecom-

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munications (BIPT)—conducts the market analyses and imposes specific obligations to the dominant operators (for example, about transparency, network access or tariffs).

The market analysis procedure reflects quite well both the vertical and horizontal specialisation of telecoms regulation, and the related procedural coordination. In this procedure, BIPT first organises a public consultation, then sends its draft decision for a non-binding advice to the Competition Council, as well as the Regulators' Conference (CRC), composed of the regional media regulators, which can decide to handle the issue itself. In the second phase, the European Commission organises an informal pre-notification meeting with BIPT, before the institute formally notifies the expected measures. The absence of 'serious doubts' from the Commission about this notification is interpreted as an agreement—if not, the regulator's decision is frozen. Consider the following: A negotiation takes place with BIPT; the Commission vetoes the decision in case of failure, a situation seldom observed. As of 2010, the new EU telecoms regulator, Berec, will issue non-binding recommendations about market analyses as well. Although vertical coordination is formally based on hierarchy, cooperation is strong with the national authorities.

Coordination in the telecoms sector also happens between the Government and sector-based regulators at different levels. At the European level, advisory platforms deliver non-binding advice about draft directives that are often respected (for example, the European Regulators Group). Inside the European Commission, a joint task force coordinates electronic communications issues with general competition. At the Belgian level, law-making is a competence of the Federal Government, but BIPT drafts legislation. Appeals against BIPT can be lodged at the Court of Appeal in Brussels. At the Regional level, the media regulators are only involved in broadcasting regulation.

The division of tasks between the competition authorities and telecoms regulators is clear, and both organisations cooperate with each other. The Competition Council gives non-binding advises on the market analyses of BIPT, which then informs them about possible infringements.

Concerning inter-policy specialisation, the EU telecoms package initially produced a conflict of competence between BIPT and the Regional media regulators. The Constitutional Court compelled the Regions and the Federation to reach an agreement, signed in 2006, that set up the CRC and the Inter-Ministerial Committee to solve this kind of conflicts.

### Non-Binding Coordination in Energy

Liberalisation of the electricity and natural gas sectors has been driven by the European Union as of 1996, but enforced since 2002 in Belgium. The regulatory arrangements of both sectors are divided in four submarkets: production, transmission/transport, distribution and supply. Production and supply have been liberalized while transmission/transport and distribution remain monopolies. At the Federal level, the Minister of Energy regulates the use of the transmission and transport networks with the support of the independent Commission for the Electricity and Gas Regulation (CREG), while the Regional level is aimed towards distribution networks. The European Commission is not directly involved in the day-to-day regulatory process.

Several structural ties link the EU and the Federal or Regional levels together. Comitology committees composed of national representatives advise the European Commission together with the European Regulators' Group for Electricity and Gas (EREG). The involvement of the Commission in regulation is generally limited to the provision of standard guidelines about cross-border connections. In the recently approved third package the competencies of the EU-level are expanded, and it is anticipated that the new European Agency for Energy, ACER, will be more involved in technical regulation. Between the Federal and Regional levels, the competencies are exclusive, i.e. each level works on their own, but advisory platforms coordinate common matters (*Overleg Staat-Gewesten Groep*, and *Forum des régulateurs belges de l'électricité et du gaz*). The only exception is tariff regulation, which is done on the Federal level by the Federal sector regulator for both the transmission/transport network and the distribution networks.

As such, the policy levels are independent from each other and coordination is mainly horizontal. At the Federal level, the Minister of Energy grants the licences to the supplier, yet, CREG prepares the draft decision. The division of work is similar at the Regional level. For example, the Flemish Government sets the general conditions for licensing suppliers, after a non-binding advice of the *Vlaamse Reguleringsinstantie voor de Elektriciteits en Gasmarkt* (VREG). VREG grants the license, but the Flemish Minister of the Energy can overturn this. The most important difference between the two levels is that the Federal Minister takes most regulatory decisions, while it is the sector-based regulator on the Regional level.

The division of competencies between the energy regulators and the general competition authorities is relatively clear. At the Federal level, CREG reports anti-competitive behaviour to the Federal Minister and the Competition Council. The instrument is the exchange of confidential

information, which had not been possible for some time, but legislative changes were made to correct this blind spot. The Regional level is not involved in general competition.

In terms of cross-sector coordination, there is no specialisation between natural gas and electricity. The same organisations are responsible for regulating both sectors. With other sectors, such as the environment, coordination is usually organised at the Government levels during the policy-making stage through inter-cabinet and inter-department consultations.

### Non-Binding Coordination in Specialised Regulatory Arrangements

A quite substantial number of authorities across different governmental levels participate to the regulatory arrangements, especially in the energy sector where Federal and Regional sector regulators are present. Independent regulatory agencies advise the legislator and either take decisions on individual cases or prepare ministerial decisions. The comparison of the non-binding coordination instruments used in the energy and telecoms sectors follows the four dimensions of specialisation (see Table 1).

Non-binding coordination instruments are widely used in the vertical interactions. In telecoms, the European Commission gives a non-binding advice on Federal draft laws and the choice of remedies to BIPT. Reciprocally, BIPT is consulted about draft European directives. These consultations do not take place in the energy sector where governmental relationships dominate. The other instruments are used in both sectors. Advisory platforms com-

vertical coordination.

Non-binding instruments are much less used in horizontal dimension in the telecoms than in the energy sectors. In both sectors, the main regulators are consulted about drafts Federal or Regional laws. In energy, the cooperation between the Regions passes through the FORBEG platform even if it was not initially designed for this. Equally, the Flemish Region organises periodical management meetings between the administrations and agencies (for example, energy savings).

The cooperation between the sector-based and general competition authorities uses non-binding instruments as well. In telecoms, the Competition Council is consulted on draft decisions of BIPT, but not in the energy sector where cooperation is limited to informal contacts with CREG and VREG. A procedure of exchange of confidential information is in place and the regulators have the duty to denounce anti-competitive behaviour. At the EU level, inter-department consultations are frequent and even took the form of a joint task force in the telecoms sector.

Despite the huge impacts of these sectors on economics and society, the non-binding instruments are not much used in inter-policy coordination. This coordination is limited to the classical inter-department consultations at each level of authority. The different regulators and authorities at federal and regional level do not have formal procedural contacts, except in few binding procedures (for example, the technical requirements for mobile phone antennas).

**Table 1** | Distribution of policy fields over levels of government.

	Telecommunications				Energy			
	Vertical	Horizontal	Competition	Inter-policy	Vertical	Horizontal	Competition	Inter-policy
Non-binding advice	X	X	X	-	-	X	-	-
Advisory platform	X	-	-	-	X	X	-	-
Information exchange and reporting	X	-	X	-	X	-	X	-
Coordinating body	X	-	X	X	X	X	-	X

posed of the national sector-based regulators advise the European Commission. In energy, a platform also facilitates coordination between the Federal and Regional levels. Exchange of information occurs between the Commission and the Member States. Coordinating bodies such as the EU Communications Committee or ENOVER for the preparation of Belgian decisions for energy make up this

### Conclusions

The aim of this article was to show the role of non-binding instruments in the coordination of regulation in network industries from a comparison of the telecoms and energy sectors in Belgium. First, the results show that non-binding coordination instruments are widely used in both sectors and developed in every dimension of specialisation.

They contribute to enhance interactions between regulators at different levels or with different tasks. Second, differences between sectors are obvious. Vertical integration is high in the telecoms while the energy regulation is rather organised horizontally. The strategic character of energy issues and the will of national government to keep control on the sector is a possible explanation of this difference. Third, the weight of some regulators is high even if they intervene only through non-binding procedures in the decision-making process. Usually, their advice is followed because they hold the technical expertise. Fourth, some significant non-binding coordination operate ‘in the shadow of the law’; in other words, regulators use non-binding procedures at one stage, but with the possibility

to decide alone or veto a decision at a later stage. This wide use of non-binding coordination instruments attests of the complexity of the interactions between the different actors involved in the regulation of liberalised network industries. It also reveals a consciousness and a reaction to the challenges of a specialised regulatory arrangement in terms of preserving the effectiveness of regulation. ★

#### References

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